Office - Supreme Court, U. S.
FILED
JAN 24 1946
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1945

No. 519

JOSEPH D. MCGOLDRICK, Comptroller of the City of New York, and ALBERTSON PATTERSON, Treasurer of the City of New York,

Petitioners,

against

JOHN T. CLARK & SON,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of New York

BRIEF FOR PETITIONERS

January 23, 1946.

JOHN J. BENNETT,
Corporation Counsel
of the City of New York,
Counsel for Petitioners,
Municipal Building,
New York 7, N. Y.

ISAAC G. DOUGHERTY,
HARRY KAUFF,
of Counsel.

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Statement of the Case	3
1. Facts	3
2. The Tax Statutes Here Involved	4
3. Provisions of Statutes Involved	5
4. History of the Tax Involved	5
Specification of Errors	7
The Issue	8
Argument	9
Conclusion	10

Table of Cases Cited

Adams Mfg. Co. v. Storen, 304 U. S. 307 (1938)	8
Clark & Son, Matter of John T., v. McGoldrick, 294 N. Y. 908 (1945)	2
Clark & Son, Matter of John T., v. McGoldrick, 269 App. Div. 685 (1945)	2
Gwin, White & Prince, Inc. v. Henneford, 305 U. S. 434 (1939)	8
McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33 (1940)	7, 8

PAGE

McGoldrick et al. v. Carter & Weekes Stevedoring Co., No. 518 ..... 3, 9, 10

New York Rapid Transit Co. v. City of New York, 303 U. S. 573 (1938) 7

Puget Sound Co. v. Tax Commission, 302 U. S. 90 (1937) 7, 8, 9, 10

Western Live Stock v. Bureau of Revenue, 303 U. S. 250 (1938) 7, 8, 10

Other Authority Cited

Report, Commission on Municipal Revenues and Reduction of Real Estate Taxes (March 13, 1945) 6

Statutes Cited

Administrative Code of the City of New York, Chap. 41:

Title O 4
Title R 4, 5
Title RR 4

New York City Laws:

Local Law No. 9 of 1934 5
Local Law No. 20 of 1938 4
Local Law No. 103 of 1939 4
Local Law No. 78 of 1940 4
Local Law No. 87 of 1941 4

New York Constitution:

Article XVI, Section 1 ..... 4n

PAGE

New York Laws:

Civil Practice Act, Art. 78 2
General City Law, Art. 2-B 4, 5
Laws of 1933, ch. 815 6
Laws of 1934, ch. 302 5
Laws of 1934, ch. 873 4
Laws of 1938, ch. 444 4
Laws of 1939, ch. 659 4
Laws of 1940, ch. 245 ..... 4, 6
Laws of 1941, ch. 199 4
Laws of 1944, ch. 382 6

United States Code, Tit. 28, Sec. 344, subd. (b) 2

United States Constitution:

Commerce Clause (Art. 1, §8, cl. 3) 2, 7, 8, 9, 10

Supreme Court of the United States

OCTOBER TERM, 1945

No. 519

JOSEPH D. MCGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York,

Petitioners,

against

JOHN T. CLARK & SON,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of New York

---

BRIEF FOR PETITIONERS

A writ of certiorari was granted by this Court on November 19, 1945, to review a final order of the Court of Appeals of the State of New York (R. 125-126) affirming a final order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department (R. 123-124), which nullified a determination of the petitioner-Comptroller denying respondent's application for refund of gross receipts taxes, and penalties thereon, paid under the New York City general business tax laws for the years 1938 to 1941. The amount involved is $4,942.37, consisting of $4,770.23 tax, and $172.14 penalties (R. 14).

The Court of Appeals nullified the Comptroller's determination upon the sole ground that the application of the New York City general business tax to the respondent's stevedoring business constituted a violation of the Commerce Clause (Art. 1, §8, cl. 3) of the Federal Constitution (R. 125).

Opinions Below

The Court of Appeals affirmed the determination of the Appellate Division without opinion. Its memorandum of affirmance is reported in 294 N. Y. 908 (1945).

The memorandum opinion of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, before which the proceedings to review the Comptroller's determination were heard in the first instance (R. 1-2), pursuant to Article 78 of the New York Civil Practice Act, is reported in 269 App. Div. 685 (1945) and reads as follows (R. 124):

> "Determination of the Comptroller of the City of New York unanimously annulled, with $50 costs and disbursements to the petitioner, and the respondents directed to refund petitioner's deposit, with interest on the authority of Puget Sound Stevedoring Co. v. Tax Commission (302 U. S., 90)".

Jurisdiction

The jurisdiction of this Court arises under U. S. Code, Title 28, §344, subd. (b). The decision of the Court of Appeals was based solely upon the ground that the tax as applied to respondent violated the Commerce Clause (R. 125). The decision of the Court of Appeals was rendered on July 19, 1945 (R. 125). The petition in this Court was filed on October 17, 1945 (R. 130), within three months of the decision of the Court of Appeals.

The petition was granted on November 19, 1945 (R. 130), concurrently with the granting of the petition filed by petitioners in *McGoldrick et al.* v. *Carter & Weekes Stevedoring Company*, No. 518, which involves exactly the same question and will be argued at the same time as this case.

Statement of the Case

1. Facts

The respondent is a New York corporation engaged in the business of general stevedoring, which consists of loading and unloading ships' cargoes and the contents of railroad freight cars, moving in interstate and foreign commerce (R. 19, 46, 50), and the performance of other services, such as cleaning of docks, passenger waiting rooms, and the offices of the steamship companies it serves (R. 59). Its sole office is in the City of New York (R. 49) and all its activities are performed within the territorial limits of the City of New York (R. 53-54, 61), except a very small portion of its services (yielding a tax of $488.36* out of a total tax of $4,770.23), which are performed in New Jersey.

The petitioners did not in the New York State courts and do not here press the issue of the taxability of the receipts for New Jersey services. The petitioners limit themselves here as they did in the State courts solely to the question of the taxability of the respondent on its gross receipts from its activities performed wholly within the territorial limits of the City of New York.

None of the activities sought to be taxed, nor any part of them, is carried on outside the territorial limits of the City. All of the respondent's contracts for its services are made in New York City (R. 49-50). Its shops for the repair of its machinery are located in the City (R. 50).

*Arrived at by applying the tax rates under the various local laws to the New Jersey receipts as shown by the record (R. 53-54).

The taxpayer is paid by its customers, *i.e.*, the steamship companies, only for its stevedoring services and only these receipts from its own activities in the City are sought to be taxed (R. 22, 28-31).

2. The Tax Statutes Here Involved

The statutes, the constitutionality of which is involved, are the New York City general business and financial tax laws for the years 1938 to 1941, Local Laws No. 20 of 1938, No. 103 of 1939, No. 78 of 1940 and No. 47 of 1941 (constituting Titles O, R and RR of Chapter 41 of the Administrative Code of the City of New York). The provisions of Local Law No. 78 of 1940 (Title R of Chapter 41 of the Administrative Code), which, so far as the issues herein are concerned, are substantially the same as the provisions of the other local laws involved, are set out in full as Appendix A in the Appendix of Statutes to be submitted herewith.

The first three of these local laws were enacted pursuant to authority conferred upon the City of New York by Laws of New York of 1934, ch. 873, as annually amended in each of the years 1938 to 1940, inclusive (L. 1938, ch. 444; L. 1939, ch. 659; L. 1940, ch. 245). The provisions of the 1940 State enabling act pursuant to which Local Law No. 78 of 1940 was enacted (L. 1940, ch. 245) are set out in full as Appendix B in the Appendix of Statutes.*

Since 1941 the authority of the City to impose this type of tax derived from Article 2-B of the General City Law of the State of New York, which was added to the General City Law by Laws of New York of 1941, ch. 199. Article 2-B confers this authority by prescribing a model general business tax law which the City is authorized to adopt.

* The provisions of the 1940 enabling act are substantially the same as those of the 1939 enabling act, but differ somewhat from the 1938 act. The changes from the 1938 act were made necessary by a new provision of the New York State Constitution (Article XVI, Section 1), effective January 1, 1939. These changes do not affect the issues in this case.

This model law was copied practically verbatim from the City's 1940 general business tax law set out in Appendix A. The provisions of Article 2-B, except for the model law, are set forth as Appendix C of the Appendix of Statutes.

3. Provisions of Statutes Involved

The New York City general business tax is imposed upon all persons "carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity" (Title R, ch. 41 of the Administrative Code, §R41-2.0 [Appendix A]). Under the local laws of 1938, 1939 and 1940 it was imposed at the rate of 1/10%, and under the 1941 law at the rate of 1/20%, on all receipts "received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity" (§R41-2.0). Receipts are defined as "the gross receipts received in or by reason of any sale made or services rendered or commercial or business transaction had in the city" (§R41-1.0, par. 3). The City general business tax law has a provision (§R41-2.0, par. b) authorizing the Comptroller, in situations where a receipt cannot validly be taxed in its entirety by reason of the provisions of the Constitution of the United States or otherwise, to provide for allocation of such receipt "to the end that only that part of such receipt which is properly attributable and allocable to the doing of business in the City shall be taxed hereunder". Since the respondent's activities sought to be taxed herein take place wholly within the City of New York, all its receipts from these activities are attributable to local business without recourse to this allocation provision. The respondent, therefore, is not affected by this provision.

1. History of the Tax Involved

The first New York City general business tax was imposed by Local Law No. 9 of 1934, enacted pursuant to authority conferred by Laws of New York of 1934, ch.

302. Local laws imposing these taxes have been and continue to be renewed and extended annually up to the present time, pursuant to subsequent State enabling acts authorizing them.

The first such enabling act was passed in 1933 (L. 1933, ch. 815). No general business tax was imposed by the City under this first enabling act. Prior to these enabling acts, the City's taxing authority was limited to taxes on real estate. The enabling acts extended the City's taxing authority, permitting it to impose other types of taxes in order "to relieve the people from the hardships and suffering caused by unemployment" (see, *e.g.*, L. 1940, ch. 245 [Appendix, p. 18]). The City's need for additional tax revenue from sources other than real property is reflected in the following excerpt from the report, dated March 13, 1945, of the Commission on Municipal Revenues and Reduction of Real Estate taxes (created by L. 1944, ch. 382),* at page 15:

> "With declining assessed valuations and sharply curtailed income from shared taxes, the municipalities found themselves confronted with the necessity of raising the moneys required not only to meet their normal costs of government but also to pay the debt service upon the huge borrowings accumulated in the twenties and to provide vastly increased relief and welfare services to their citizens. Real estate tax delinquencies pyramided rapidly."

And further, at page 20:

> "Experience in the depression years demonstrates that the gap between mounting costs and declining

* The problem of relieving real estate of the burden of taxation in New York State has been the subject of legislative and other official study for many years. The Commission referred to is the last of many which considered the problem. During the period from 1916 to 1938 twenty-one commissions were appointed to devise a more equitable revenue system for the State and its subdivisions. Since 1938 several other commissions have inquired into one or more phases of the subject. See, Report, Commission on Municipal Revenue and Reduction of Real Estate Taxes, March 13, 1945, p. 11.

revenues cannot, and should not, be bridged by imposing upon real estate an additional burden of debt and taxation."

The general business tax here involved is one of a series of taxes which the City of New York enacted pursuant to the enabling legislation. These taxes include, amongst others, the New York City sales tax which was reviewed and upheld by this Court in *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940), and the New York City utility tax which was reviewed and upheld by this Court in *New York Rapid Transit Co.* v. *City of New York*, 303 U. S. 573 (1938).

All of these taxes have been continued up to the present time by reenactment under periodic extensions of the enabling acts. In 1942 the restriction, which until then limited the use of the revenues from these taxes for relief purposes only, was lifted. Since that time the City has been permitted to treat the revenues as part of its general funds, thus making possible the reduction of the real estate tax load borne by local real property owners.

Specification of Errors

Petitioners contend that the Court of Appeals erred:

(a) In failing to hold that the New York City general business tax was validly imposed upon respondent's receipts here involved, under the recent decisions of this Court in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938) and later cases.

(b) In following the decision of this Court in *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90 (1937), and accepting the holding in that case rather than the principles enunciated in *Western Live Stock* v. *Bureau of Revenue, supra*, and subsequent cases, as controlling on the question of the validity under the Commerce Clause of the City general business tax as applied to the respondent.

(c) In holding that the City general business tax as applied to respondent's receipts from its stevedoring activities here sought to be taxed constituted an unconstitutional burden on interstate commerce.

(d) In regarding itself as compelled by the Commerce Clause to affirm the determination of the Appellate Division and to annul the Comptroller's determination denying respondent's application for refund of City general business taxes paid by it on its receipts from its stevedoring activities carried on wholly within the territorial limits of the City.

The Issue

The question presented is whether the New York City general business tax imposed upon the respondent's gross receipts from its stevedoring activities carried on wholly within the territorial limits of the City of New York is invalid under the Commerce Clause.

Respondent contends that the holding of *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90 (1937),* is decisive of this case and that under that holding the tax here involved is invalid.

Petitioners contend that the case at bar is controlled by holdings of this Court in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), and subsequent cases including, *inter alia*, *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307 (1938), *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434 (1939), and *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940), and that under these cases

* In the *Puget Sound* case the State tax there involved was held valid as to certain activities of the taxpayer regarded by the Court as not in interstate commerce. The tax was held invalid as to the taxpayer's stevedoring activities which were held to be interstate commerce (See 302 U. S., at 94). It is only the latter holding which is pertinent to the instant case. Where the *Puget Sound* holding or decision, etc., is referred to in this brief, it is the latter holding only that is intended.

the tax is valid. Petitioners contend also that the *Puget Sound* case has been rejected as authority and in effect overruled.

Argument

This case presents the identical issue involved in the companion case of *McGoldrick et al.* v. *Carter & Weekes Stevedoring Company*, No. 518, which will be argued at the same time. In our brief in that case we discussed at length the principles and authorities which are also applicable to the case at bar. In so far as the receipts here sought to be taxed are concerned, the facts in this case are indistinguishable from the facts in the companion case. The tax upon the receipts from the relatively small portion of respondent's stevedoring services performed in New Jersey is not in issue here.*

Copies of our brief in *McGoldrick et al.* v. *Carter & Weekes Stevedoring Company*, No. 518, have been served upon counsel for the respondent in this case, who also appear as counsel for Carter & Weekes Stevedoring Company in the companion case.

In that brief we demonstrated that the New York City general business tax, which applies generally and without discrimination to all business activities carried on within the City, is properly imposed upon the respondent's gross receipts from its stevedoring activities carried on solely and exclusively within the City. The tax is not barred by the Commerce Clause because it does not regulate interstate commerce. The tax does not discriminate against interstate commerce, is commensurate only with wholly local activity, and does not subject that commerce to the possibility of multiple tax burdens. The tax merely exacts from interstate commerce the same fair contribution toward the support of local government as is exacted from intrastate business.

* See page 3, *supra*.

This case is controlled by the principles of *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938) and subsequent cases, and not by the decision in *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90 (1937). The *Western Live Stock* and later cases comply with the basic principles laid down by this Court for determining the validity of State taxes under the Commerce Clause, whereas the *Puget Sound* case fails to comply with those basic principles. Moreover, the *Puget Sound* case has in effect been rejected and overruled by this Court.

In order to avoid unnecessary repetition we respectfully refer the Court to our brief in the companion case, No. 518, for our complete argument.

CONCLUSION

The final order and judgment should be reversed and the petitioner-Comptroller's determination reinstated.

Dated: New York, N. Y., January 23, 1946.

Respectfully submitted,

JOHN J. BENNETT,
Corporation Counsel
of the City of New York,
Counsel for Petitioners.

ISAAC C. DONNER,
HARRY KATZ,
of Counsel.